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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 134

IN THE MATTER OF THE APPLICATION
of
WALTER MARVIN, JR.,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Counter-Statement of Question Presented

Does the First Amendment to the United States Constitution preclude a State from requiring an individual who desires to purchase or carry a firearm to state whether he is a member of an organization which he knows to advocate the commission of acts of force or violence designed to overthrow the Government or deny others their constitutional rights?

Counter-Statement of the Case

The petitioner, Walter Marvin, Jr., seeks a writ of certiorari to review the judgment of the New Jersey Supreme Court, affirming the refusal of a local chief of police to issue him a firearms purchaser identification card because his application was incomplete. *Application of Walter Marvin, Jr.*, 53 N. J. 147 (1969) (P21 to P32).

The requirement that a firearms purchaser identification card be secured before an individual will be allowed to purchase a rifle or shotgun was imposed by Chapter 60 of the Public Laws of New Jersey of 1966 (N.J.S. 2A:151-1, *et seq.*). The main thrust of Chapter 60 is to prevent dangerous, unfit and criminal elements from acquiring firearms. The legislation seeks to accomplish this objective by providing that a person who desires to purchase firearms must first apply for a firearms purchaser identification card or pistol permit, and that certain classes of persons are not to be granted such cards or permits. N.J.S. 2A:151-33. The Act thus provides that an identification card or permit shall not be issued where the prospective purchaser (1) has been previously convicted of a crime; (2) is addicted to narcotics; (3) is a habitual drunkard; (4) is confined to a hospital for reasons of mental disorder; (5) is a minor under the age of 18 years; or (6) is a person to whom issuance would not be in the interest of the public health, safety, or welfare. N.J.S. 2A:151-33(a), (c) and (d). Persons who have been alcoholics, confined for mental disorders or have suffered from physical defects which would make it unsafe for them to handle firearms must produce satisfactory evidence of their present competency to handle firearms. N.J.S. 2A:151-33(b).

One of the means which the law provides to enable issuing officers to determine whether an applicant for a fire-

arms identification card or pistol permit falls within one of the disqualified classes is the requirement that an application, containing various pertinent information, be submitted. N.J.S. 2A:151-35. The applicant must set forth his name, address, place of business, sex, occupation, age and distinguishing physical characteristics. He must state whether he has ever been adjudged a delinquent or convicted of a crime or disorderly persons offense. He must also indicate whether he is a drug addict or alcoholic, whether he suffers from a physical defect or sickness, and whether he has been confined to an institution or otherwise medically treated for a psychiatric condition. Finally, the applicant is required to indicate whether he is or has ever been a member of an organization which he knows to advocate the commission of acts of force or violence designed to overthrow the government or deny others their constitutional rights.

The permit or identification card is to be granted within 10 days unless good cause for a denial appears. N.J.S. 2A:151-36. Any applicant aggrieved by a denial may, within 30 days of the denial, request a hearing in the appropriate county court and such hearing shall be held within 30 days. N.J.S. 2A:151-34. No formal pleadings nor filing fees are required.

This Court has recently dismissed for lack of a substantial federal question an appeal challenging the constitutionality under the Second Amendment of the general regulatory scheme set forth in Chapter 60. *Burton* v. *Sills*, 53 N. J. 86 (1968), *appeal dismissed* 37 U. S. L. W. 3409-3410 (1969). The present litigation involves a challenge to only a limited aspect of Chapter 60.

When the petitioner applied for a purchaser identification card, he refused to answer the questions relating to membership in any organization advocating commission

of acts of force or violence designed to overthrow the Government or to deny others their constitutional rights. On the back of the application, he specifically stated that his reasons for refusing to answer were that the questions sought to penalize membership in non-criminal organizations and were unconstitutionally vague (P51). Because the application submitted was incomplete, the local chief of police refused to issue petitioner an identification card. A hearing on the application was then held in the county court, which affirmed the chief of police's denial.

The petitioner thereafter appealed unsuccessfully to the Appellate Division and Supreme Court of New Jersey. The construction of the statute by these courts should be noted. Specifically, the New Jersey Supreme Court clearly indicated that the inquiry to which an applicant must respond is "whether he is or ever has been a member of an organization which he knows to advocate the commission of acts of force or violence designed to overthrow the Government or deny others their constitutional rights" (P21 to P22). The court further indicated that this question "may be answered negatively, affirmatively, or qualifiedly" (P24) and that an applicant "may expressly confine his answers to present and recent memberships, pointing out that since the sole issue is his current qualification to purchase and carry weapons, his past memberships may be inquired about only to the extent that they are relevant and reasonably related to his present fitness." (P31a). The court also stressed throughout its opinion that mere membership in an organization would not constitute an adequate grounds on which to deny an application and that the issuing authority "at all times has the affirmative burden of determining whether the applicant is individually qualified or disqualified under the terms of N.J.S. 2A:151-33" (P24).

On this view of the statute's import, the Supreme Court of New Jersey held that the petitioner was not constitutionally privileged under the First Amendment simply to refuse to answer the inquiry. It therefore sustained the refusal to issue petitioner a firearms purchaser identification card, without prejudice to the filing of a new application.

ARGUMENT

POINT I

The First Amendment to the United States Constitution does not entitle an applicant for a firearms purchaser identification card to refuse to state whether he is a member of an organization which he knows to advocate commission of acts of force or violence designed to overthrow the Government or deny others their constitutional rights.

The only question here presented is whether a person who wants to buy a firearm may be required to state whether he is or has ever been a member of any of a class of organizations deemed by the legislature to pose a threat to the public health, safety or welfare. As the New Jersey Supreme Court properly observed: "[The law] does not require any loyalty or comparable oath on sanction of loss of employment or criminal prosecution; it does not prohibit any organizational membership or any organizational act on sanction of criminal or other penalty; and it does not provide for denial of a pistol permit or firearms purchaser identification card because of membership in any designated organization." (P23 to P24). The information sought—membership in an organization advocating use of force or violence designed to overthrow the Government or deny others constitutional rights—is certainly relevant to whether the applicant

should be allowed to purchase a firearm. On the other hand, membership in an organization would not by itself constitute an adequate basis for denying an individual an identification card or gun permit, and the statute so recognizes. Thus, once having been advised that an applicant is a member of such an organization, the issuing officer must proceed to determine the applicant's individual fitness to purchase and carry a firearm, taking into consideration his membership in the organization, the nature of that membership, and any other pertinent information. He then decides whether the "totality of circumstances" indicates that issuance of an identification card to the applicant would "not be in the interest of the public health, safety or welfare." N.J.S. 2A:151-33(d). See *Burton* v. *Sills, supra.* The decisions of this Court interpreting the First Amendment do not indicate any constitutional infirmity in the foregoing procedure for determining an individual's fitness to buy and carry firearms.

In *Konigsberg* v. *State Bar of California,* 366 U. S. 36 (1961), the Court held that even after an applicant for admission to the bar has unequivocally stated that he does not believe in violent overthrow of the Government and has never belonged to an organization advocating such action, he may still be required to answer questions concerning his present or past membership in the Communist Party. The Court found that the Committee of Bar Examiners could reasonably conclude that the failure to answer such questions had obstructed inquiry into the applicant's qualifications, and it further found that the State's interest in securing this information outweighed any deterrent effect upon the freedom of speech and association guaranteed by the First Amendment. The reasoning of this Court in *Konigsberg* applies *a fortiori* to the present case. As stated by the New Jersey Supreme Court: "New Jersey's interest in preventing the gathering of firearms by groups dedicated to the forceful overthrow

of the Government or the forceful denial of constitutional rights appears to exceed by far the interest of the State advanced in *Konigsberg.*" (P27). Furthermore, the inquiry in question is not directed towards membership in any particular organization, such as the Communist Party (see *United States* v. *Brown,* 381 U. S. 537 (1965)), but is specifically keyed to the governmental interest involved by asking whether the applicant belongs or has belonged to an organization advocating commission of acts of force or violence designed to overthrow the Government or deny constitutional rights.

By contrast, most of the cases cited by the petitioner involved situations where persons were required to take *oaths* that they were not members of certain organizations or did not advocate or approve the overthrow of the Government, under threat alternatively of losing employment if they failed to take such oath, or running the risk of being convicted of perjury if the oath was taken falsely. See *e.g. Whitehill* v. *Elkins,* 389 U. S. 54 (1967); *Keyishian* v. *Board of Regents of the University of the State of New York,* 385 U. S. 589 (1967); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961). The petitioner herein was placed in no such predicament. He could have answered the question affirmatively, negatively or qualifiedly, and there would have been no automatic adverse consequences from any answer.

The statutes overturned in several of the cases cited by petitioner penalized an individual for mere membership in an organization, without regard to character of his own activity in the organization. The Court theretofore found such laws to suffer from impermissible "overbreadth." See *e.g. United States* v. *Robel,* 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents, supra; Elfbrandt*

v. *Russell, supra; Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). No such consequence results from an affirmative reply to the inquiry required by Chapter 60; the issuing authority must in every instance make inquiry into the nature of the individual applicant's activity in the organization mentioned.

Certain of the cases cited by petitioner also involved statutes which were impermissibly vague. See *e.g. Keyishian* v. *Board of Regents, supra; Cramp* v. *Board of Public Instruction, supra.* Thus, in *Cramp* the statute referred to lending aid, support, advice, counsel or influence to the Communist Party. Commenting upon this language, the Court said:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement." 368 U. S. at 286.

By contrast, N.J.S. 2A:151-35 does refer to advocacy of violent overthrow of Government and does refer to membership, and thus is not lacking in terms susceptible of objective measurement.

The remaining First Amendment cases cited by petitioner involved open-ended inquiries into an individual's organizational ties, the scope of the inquiry thus offending the First Amendment by going beyond the information needed to meet any legitimate governmental interest. See *Shelton* v. *Tucker,* 364 U. S. 479 (1960); *Schneider* v. *Smith,* 390 U. S. 17 (1968). Here the inquiry is carefully limited to the governmental interest involved; an indi-

vidual who desires to buy and carry a gun is asked to state whether he belongs to an organization advocating use of force or violence to overthrow our Government or deny others constitutional rights.

The Supreme Court of New Jersey thus correctly concluded that New Jersey's interest in keeping firearms out of the hands of the dangerous and unfit clearly outweighs any minimal effect upon free association occasioned by the inquiry in question. Hence, petitioner has not made an adequate showing why this Court should afford an additional review of his constitutional claim.

POINT II

The Court does not have jurisdiction to consider the constitutionality of N.J.S. 2A:151-33, because the validity of that section was not raised or passed upon in the State courts.

The petitioner asks the Court to consider whether the provision in N.J.S. 2A:151-33(d) prohibiting issuance of an identification card to "any person where the issuance would not be in the interest of the public health, safety or welfare" violates the due process clause of the Fourteenth Amendment because it allegedly provides no standards or procedure for determining whether to grant an application. See *Burton* v. *Sills, supra,* 53 N. J. at 90-92. An examination of the briefs filed in the State courts discloses that this issue is now being raised for the first time. In fact, the petitioner did not even cite N.J.S. 2A:151-33 (d) in his brief submitted to the Supreme Court of New Jersey.

This failure precludes the petitioner from now asking the Court to consider the issue:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell* v. *Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings* v. *Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller* v. *Nicholls,* 4 Wheat 311, 315 (1819) and since." *Cardinale* v. *Louisiana,* 22 L. Ed. 2d 398, 400 (1969).

In addition, perhaps because he now raises the issue for the first time, petitioner seriously misconceives the thrust of N.J.S. 2A:151-33(d). The cases he cites generally relate to licenses required as a precondition to the exercise of First Amendment freedoms (*Shuttlesworth* v. *City of Birmington,* 89 S. Ct. 935 (1969)), or other prior restraints upon the exercise of First Amendment rights (*Lamont* v. *Postmaster General,* 381 U. S. 301 (1965); *Freedman* v. *Maryland,* 380 U. S. 51 (1965)). A firearms purchaser identification card, on the other hand, does not have to be obtained as a precondition to the exercise of First Amendment freedoms; it is simply a reasonable restraint on the acquisition of firearms. See *Burton* v. *Sills, supra,* 53 N. J. at 104-105. Furthermore, we again note that the issuing official at all times has the affirmative burden of determining whether the applicant is indi-

vidually qualified or disqualified under the terms of N.J.S. 2A:151-33 (P24), thus distinguishing the situation here from one where an applicant for a governmental benefit bears the burden of establishing that his exercise of First Amendment rights, including speech, have not been unlawful. See *Speiser* v. *Randell,* 357 U. S. 513 (1958).

The petitioner also assumes, without support in the record, that the mere failure to answer the questions concerning organizational membership automatically disqualifies an applicant from obtaining a purchaser identification card. However, this is not a case where an applicant has declined to answer certain questions and then requested a hearing to explain some special reason for declining. Throughout this litigation, petitioner has urged an absolute constitutional privilege under the First Amendment to refuse to answer the question concerning his organizational membership. It is now suggested for the first time that he might wish to present some other explanation of his action. Accepted principles of constitutional adjudication preclude petitioner from shifting his theory of the case in this fashion. *Cardinale* v. *Louisiana, supra.* In any event, we observe that the affirmance by the Supreme Court of New Jersey was without prejudice to the filing of a new application, so petitioner will be afforded another opportunity to present any pertinent evidence to the issuing authority or county court. At that time the New Jersey courts would have an opportunity, if petitioner raised the point, to consider whether there may be circumstances in which certain of the requirements of N.J.S. 2A:151-35 would be inapplicable.

However, the petitioner failed throughout the litigation in the state courts to raise the issues presented under Point III of his Petition for Writ of *Certiorari,* so the Court does not now have jurisdiction to consider it.

CONCLUSION

Since the decision of the Supreme Court of New Jersey is in accord with both the applicable decisions of this Court and the United States Constitution, respondent respectfully submits that the within petition for writ of certiorari should be denied.

Respectfully submitted,

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